No. 545

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CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1940

LOCKE MILLER,
Petitioner,

vs.

MICHAEL J. KIRWAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX.

SUBJECT INDEX

	Page
Petition	
(Down the Page)	
Address to Court	1
A. Summary Statement of Matter Involved	2
B. Question Presented	4
C. Reasons Why the Writ Should Be Allowed	4
Certificate of Good Faith	5
Brief	
I. Opinion of Court Below	7
II. Jurisdiction	7
III. Statement of Case	9
IV. The Question Presented	9
V. Argument	9

TABLE OF CITATIONS

Bank vs. Oaklay, 4 Wheaton 235, 244	9
Brown vs. Hammel, 6 Pa. 86, 47 Amer. Dec. 431	12
Caldwell vs. Texas, 137, U. S. 692, 697	9, 13
Cohen vs. Va., 6 Wheaton 264, 379	9, 13
Hurtato vs. Col. 110, U. S. 516, 535	13
Jenson vs. Union Pac. Ry. 6, Utah 253, 256. 21 Pac. 294	11
Manhattan Ins. Co. vs. Cohen, 234, U. S. 123, 134	9
Mason vs. Hearson, 50 U. S. (9 How.) 249, 259	11
Mason vs. The State ex rel. McCoy 58 O. S. 30	14, 15
Mayor vs. Furze, 3 Hill (N. Y.) 612	11
Miedich vs. Lowenstein, 232 U. S. 236, 242, 243	9
Murdock vs. Memphis, 20 Wall, 590-628	9, 13
Newburgh vs. Miller, 5 John's Ch. (N. Y.) 100	11
Osborne vs. Bank, 9 Wheaton 738, 822-825	9, 13
Prentiss vs. Dittmer, 93 O. S. 314	14
Rock Island (Superv.) vs. U. S. 71, U. S. (4 Wall) 435, 446, 447	11
Saunders vs. Shaw, 244, U. S. 317	12
State ex rel. vs. Bd. of Ed. 8, O. N. O. 186; 11 O. D. (N. P.) 422, Cyc. 36, p. 1159 (44 Cent. Ant. Dig. Statutes), 308	11

INDEX—(Continued)

State ex rel. vs. Bish, 12 O. N. P. (N. S.) 360; 22 O. D. (N. P.) 480, 495, 496 11

State ex rel. Bill vs. Etling, 29 Kansas, 397 15

Supervisions vs. U. S. 4 Wall (U. S.) 435 10

Zeigler vs. South, etc. Ry. Co. 58, Ala. 594, 599, quoting 40 Neb. 64, 75; 58 N. W. 543 12

APPENDIX.

Federal Code, Title 18.

Section 208. Political Contributions; Solicitations 17

Section 209. Same; Not to be Received in Public Offices 18

Section 210. Same; Immunity from Official Proscription 18

Section 211. Same; Making to Officials 18

Section 212. Same; Punishment 18

Section 213. Same; Removal from Office 18

Section 199. Accepting Bribe by Member of Congress 19

Section 88. Conspiracy to Commit an Offense Against the United States 19

Sections of General Code of Ohio.

Section 175-166. Contest of Election 20

Section 4785-167. Filing Contest Petition 21

Section 4785-168. Fix Time for Trial 21

Section 4785-169. Trial Proceedings 22

Section 4785-170. Witnesses and Evidence 22

Section 4785-171. Judgment of Court 23

Section 4785-172. Appeal to Supreme Court 23

Section 4785-173. Testimony; Supreme Court 24

Rule XX—Rules of Practice, Supreme Court of Ohio 24

No.....

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MICHAEL J. KIRWAN,
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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

May it please the Court,

The petitioner Locke Miller, a citizen and resident of the United States and of the State of Ohio, respectfully prays the Court for a Writ of Certiorari herein to review and reverse the action and final order and judgment of the Supreme Court of Ohio herein, the Highest Court of that State in which a decision could be had, and that he may be restored to all things which he has lost thereby.

Petitioner says the number of said cause in said Court was 28235, which final order and judgment was rendered

and entered upon October 9, 1940, upon an application for rehearing of the decision, Chief Justice Carl V. Weygandt rendered September 20, 1940; which application was filed within time as provided by Rule XX of the Rules of said Court.

Petitioner herein was the Contestant therein. Respondent herein was Contestee therein.

A transcript of the Docket and Journal Entries in said cause and a certified copy of the Record thereof are filed herewith.

A: SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner herein filed a petition in said Supreme Court of Ohio, under Section 4785-166 to 4785-173 inclusive General Code of Ohio setting forth:

That a primary election was held in Ohio, May 14, 1940, in which nominees were chosen for various offices including nominees for members of the Congress, or House of Representatives of the United States.

That said petitioner and respondent were the only candidates on the Democratic Ticket for the nomination for Representative in Congress for the 19th Congressional District of Ohio.

That petitioner received 4,000 more or less votes untainted with any fraud or other illegality.

That the votes of said Kirwan were contaminated by fraud and a criminal conspiracy to corrupt said primary.

That said fraudulent acts and conspiracy were a violation of Sections 208 to 213 inclusive, and Section 199, Title 18, U. S. C. A. and of Section 88, Title 18, U. S. C. A. (pp. 17, 18, 19 Appendix).

That said acts violating the sections aforesaid rendered said Kirwan ineligible as a candidate for and member of the House of Representatives of the United States.

That said fraudulent acts and conspiracy, consisted of said respondent and his agents and representatives collecting forcibly from postmasters within the 19th Con-

gressional District of Ohio, under threat of reprisal and loss of jobs, money to be used in the primary campaign and general election for said Kirwan.

That said Kirwan did secure votes by said methods and was nominated by such criminal acts.

Contestant therein prayed that said nomination may be declared null and void and that the Contestant Locke Miller may be declared the lawful and only nominee for said office.

Petitioner further represents that pursuant to said section of the General Code, he took the depositions of various witnesses supporting said claims and tending to support the same; that after taking said depositions he learned the names of other material witnesses whose testimony was indispensable to a full and complete determination of the questions involved and of the rights of the petitioner therein; that on the 19th day of August, 1940, petitioner filed a motion therein supported by affidavit (R 268) asking leave to take such additional depositions as provided by Section 4785-173 General Code of Ohio (p. 24 Appendix) and that said cause be continued until said depositions could be taken. J. 271 9.

That said cause was set down for hearing on the 30th day of August, 1940, notwithstanding the motion filed for a continuance and for leave to take such additional depositions, and was heard; that Contestant at said hearing orally requested the Court to note that to proceed with said hearing without granting Contestant the right and opportunity to take such additional depositions, would be a denial of due process of law and of the equal protection of the laws contrary to the 14th Amendment to the United States Constitution.

That said right was denied in substance and effect by the ultimate dismissal of said petition without further hearing or granting the right to take said depositions as herein related.

That said Chief Justice Weygandt not only denied said motion but he admitted to the Record after said

hearing and to the consideration of the Court, affidavits and a letter (p.——R) in violation of Section 4785-173, (p. 24 Appendix) which provides that "*all testimony shall be in the form of depositions,*" and heard said cause, and on the 26th day of September ordered said petition dismissed (p.——R).

In the application for rehearing (p.——R) which was the first and earliest time at which the question could be formally raised, petitioner specifically asserted that to dismiss said petition and deny the petitioner the Right to take such additional depositions in furtherance of justice, was a denial of due process of law and of the equal protection of the laws, and so contrary to the 5th and 14th Amendments to the Constitution of the United States.

B: QUESTION PRESENTED

The question presented is the denial and refusal of the Chief Justice Weygandt to the petitioner of the Right, before said Cause was heard, to take additional testimony material to his petition, thereby preventing petitioner from presenting all the proof available to him then, but not known or available at the time the original depositions were taken.

A denial of Due Process of Law and of the Equal Protection of the Laws, contrary to the 5th Amendment and the 14th Amendment.

C: REASONS WHY THE WRIT SHOULD BE ALLOWED

It is an indispensable element of due process of law in all cases coming under the Judicial Power of Courts that each party be given the fullest opportunity to be heard and present his evidence. And it is a flagrant violation of the 14th Amendment that the Court should deny the petitioner the due process of Section 4785-173, while granting the Respondent right to submit affidavits and a letter, without opportunity of cross-examination or rebuttal, in violation of said Section 4785-173.

Petitioner herein was denied that Right of Equal Protection of the Law.

The Petitioner herein could not get, was refused by the Court, his rights which the Law creates; the Respondent was granted privileges which the Law denies.

Therefore the decision and action of Chief Justice Weygandt who alone heard and determined said proceedings, was not in accord with the applicable decisions of this Court.

LOCKE MILLER,
Petitioner.

MATTHEW L. BIGGER,
Counsel for Petitioner.

CERTIFICATE OF GOOD FAITH

I, Locke Miller, petitioner herein, do hereby certify that the filing of this petition for a Writ of Certiorari is filed in good faith and not for purpose of delay.

LOCKE MILLER,
Petitioner.

No. .....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION OF THE COURT BELOW

The opinion of the Supreme Court was embodied in the entries made a part of the record as attached to this Brief (p.291-293R), and (p.——Appendix).

II

JURISDICTION

1. The statutory provisions under which petitioner invokes the jurisdiction of this Court on the record and admitted facts is as follows:—

Act of February 13, 1925, Chapter 229, 42 Stat. 936 effective May 13, 1925, Section 237 (b):

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a statute of any State on the Ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute, or of commission held or authority exercised under the United States, and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph, nor shall the fact that a review on a writ of error might be obtained under the preceeding paragraph be an obstacle to granting a review on certiorari under this paragraph."

2. The date of the final judgment to be reviewed here was rendered October 9, 1940, as stated on page 1 petition herein.

3. The facts are all set out in the petition and "summary statement of matter involved." Pages 1 to 3 inclusive, petition herein.

4. The petition herein is filed on the —— day of ————, 1940.

5. Cases sustaining jurisdiction.

Murdock vs. Memphis, 20 Wall, 590-628; *Osborne vs. Bank* 9 Wheat 738, 822-825; *Cohens vs. Va.,* 6 Wheat 264, 379; *Caldwell vs. Texas* 137, U. S. 692, 697; *Bank vs. Oaklay,* 4 Wheaton 235, 244; 232 U. S. 236, 242, 243, *Miedich vs. Lowenstein; Manhattan Ins. Co. vs. Cohen* 234, U. S. 123, 134.

III

STATEMENT OF CASE

The case is fully stated in the petition, (p. 2).

IV

The Question presented is stated on p. 4, Petition.

V

ARGUMENT

The Petition shows that under Rule XX (Appendix) the decision of Judge Weygandt (p. 291 R) rendered September 20, 1940 became final October 9, 1940. (p. 292 R).

It will also be noted in the Petition herein that the Federal Rights were specially set up at the hearing (p. 3 petition) which proceeded without giving the contestant therein an opportunity to produce in full, by additional depositions, evidence material to his claims (p. 3 petition).

The acts enjoined by Sec. 4785-166 to 4785-173 inclusive General Code of Ohio (pp. 20 to 24 Appendix) and the Sub-Section 173 thereof, permitting additional depositions, were adopted, manifestly in the interests of the public and of individual rights requiring its exercise and were therefore mandatory.

It certainly is of the most fundamental and vital interest to the people of Ohio and the people nationally, and to the Rights of any opposing candidate, that elections or nominations for Congressional offices be kept pure and that candidates therefore, or members of Congress who

become candidates therefore, observe strictly the letter and spirit of all laws relating thereto.

The sections Title 18 (p. 17 et se. Appendix) Federal Code show that it was the intent of Congress and the People that no one should hold or be a candidate, or be eligible to hold office or become a candidate for a seat in the House of Representatives, if he knowingly and deliberately did the things prohibited by said sections.

If he was not qualified to hold such office, certainly he was not qualified to become a candidate therefore and put the people to that expense, the result of which would leave the people without fair and honest representation as contemplated by the acts of Congress itself. The Contestant contends the testimony taken, coupled with the depositions sought, but denied, would establish conclusively that Kirwan was ineligible to become a candidate for that High Office. The testimony taken is to be found on pp. 13—to—267.

Supervisors vs. U. S. 4 Wall (U. S.) 435.

p. 446. *"Where power is given by statute to public officers in permissive language, as that, they may, if deemed advisable, do a certain thing, the language used will be regarded as peremptory, where the public interests or individual rights require that that it should be."*

p. 447. *"This power is placed with the depository to meet the demands of right and to prevent a failure of justice.* It is given as a remedy to those entitled to invoke its aid, and who otherwise would be remediless."

"In such cases it is held that the intent of the legislature which is the test was not to devolve a mere discretion, but to impose a positive and absolute duty."

State ex rel vs. Bowers 26, O.C.C. 326 (16 O.C.D.) (Aff. 70, O.S. 423).

p. 341. *"The rule is that where power is given to public officers as given* the council in *Sec. 135* of the Municipal Code, or in equivalent language, *whenever the public interests calls for its exercise, the duty to so exercise the power is peremptory. In all such cases the intent of the legislature, which in the test, is not to devolve a mere discretion, but to impose a positive and absolute duty. Rock Island (supvrs.) vs. U. S.* 71, U. S. (4 Wall) 435, 446, 447.

State ex rel vs. Bish, 12 O. N. P. (N.S.) 360; 22, O. D. (N.P.) 480, 495, 496.

"Where power is given to public officers by act of the legislature, whenever the public interests or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory and permits of no discretion." Rock Island (Superv.) vs. U. S. 71, U. S. (4 wall), 435, 445, 446, 447; **Mason vs. Hearson*, 50 U. S. (9 How.) 249, 259; *Mayor vs. Furze* 3 Hill (N.Y.) 612; *Newburgh vs. Miller*, 5 John's Ch. (N.Y.) 100.

See also *State ex rel vs. Bd. of Ed.* 8, O. N. O. 186; 11, O. D. (N.P.) 422, Cyc. 36, p. 1159 (44 Cent. Ant. Dig. Statutes, Sec. 308).

It must be clear therefore when the motion and affidavit of Miller (p. 265 R) was filed 19 day of Aug including the affidavit filed the 4.9 day of Aug., in support thereof (p. 270. 279. R), that the duty became mandatory on the part of Judge Weygandt to grant a continuance of the hearing and the allowance of the order for the taking of such additional depositions. To deny this Right when such Right was specially set up, is a denial of a Federal Right. That Federal Right was set up (p. 3, 4, Petition) herein and (p.——R) application for re-hearing.

Due Process.

Jensen vs. Union Pac. Ry. 6, Utah 253, 256. 21 Pac 294.

"Each party has a right to introduce evidence to establish his right to recover, on the one hand, and to establish his defense upon the part of the other, after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them is not due process of law. Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial."

Brown vs. Hammell, 6 Pa. 86, 47 Amer. Dec. 431; *Zeigler vs. South, etc. Ry. Co.* 58, Ala. 594, 599, quoting 40 Neb. 64, 75; 58 N. W. 543.

"Due process of law implies the right of the person affected thereby, to be present before the tribunal which pronounces judgment, upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

Saunders vs. Shaw, 244, U.S. 317.

"It is a violation of due process of law to deny a litigant an opportunity to introduce his evidence."

The above case arose upon the action of the supreme court in disposing of a case without giving the party an opportunity to present his evidence.

When the supreme court of Ohio or Judge Weygandt denied that motion and application and continuance, he, in effect and as a necessary result, denied the federal right thus set up.

That this case, on the record, was a case arising under the constitution, and the laws of the United States (Title 18, p. 17 et se. Appendix) as well as the laws of Ohio, (4785-

166, etc. Gen. Code, Ohio p. 20 et se. Appendix) guaranteeing and constituting due process is clear from the following cases.

6 Wheaton 264, 379 *Cohen vs. Va.*

"A case arises under the constitution or laws of the United States, when its correct decision depends upon the construction of either. See also Osborne vs. Bk. 8 Wheat. 738, 822, 825.

Caldwell vs. Tex. 137, U. S. 692, 697.

"Law in its regular course of administration through courts of justice, is due process, and when secured by the laws of the State, the constitutional requisition is satisfied. 2 Kent laws 13. And Due process is so secured by laws operating for all alike, and not subjecting the individual to the arbitary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Bank Col. vs. Oaklay,* 4 Wheat 235, 244. The power of the state must be exerted within the limits of these principles and its exertion cannot be sustained when special, partial, and arbitrary. *Hurtado vs. Col.* 110, U. S. 516, 535."

20 Wall (U.S.) 590, 628, *Murdock vs. Memphis.*

"If it appears from the record that the plaintiff in error presented to the Court** by appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this Court attached, and we must hear the case on its merits."

"These merits have been held to be, to determine whether the propositions of law involved in the specific federal question were rightly decided, and if not, did the case of the platiff in error on the pleadings and evidence, come within the principle ruled by this Court. This has always been held to be the exer-

cise of the jurisdiction, and re-examination of the case provided by the statute."

It is the settled law in Ohio, and not over-ruled, that statutes relating to the right and ability to hold office reach back to the question of eligibility to become a candidate for that office. That must be the effect of the words which follow.

Prentiss vs. Dittmer, 93 O. S. 314.

"1. An offer by a candidate for common pleas judge, made for the purpose of effecting his election to office, that in the event of his election he will accept for his judicial services only the stipulated salary payable by the state, and that he will accept nothing that may be due and payable to him from the local or county treasury, is against public policy and an offense within the preview of Section 5176-26 General Code, which, if proven, invalidates his election.

"2. By virtue of that section, such an offense may be set forth has a ground of contest within the terms of Section 5138, General Code, *and it is not necessary to prove, in such election contest based on that sole ground, that a sufficient number of voters were so influenced by such offer as to change the election result.*

"4. Elections and election contests are controlled by specific sections of the Ohio constitution. The grant of legislative power for their control is absolute, and under such provisions the legislature had full power to and did impose conditions under which elections might be invalidated; *and where the proceeding is one involving a contested election, a prior conviction of the offenses named in Section 5175-26, General Code, is not required as a condition precedent to such invalidation.*"

Jones delivering the opinion of the Court quotes as a leading authority, "*Mason vs. The State Ex Rel. McCoy,*"

8 O. S., 30, and the following particular language of Judge Spear at Page 52 of "Mason vs. The State":

"A question much discussed is as to whether the state should be treated as imposing a *test of eligibility,* or as providing a method of removal. The matter may be not free from doubt. Possibly the provision involves both characteristics. But the better conclusion, we think, is that the intent of the legislature was, not to provide a method by which a person lawfully elected to an office may be removed therefrom, but rather a method by which the title of one to an office which he has obtained possession of in violation of the terms of the statute upon which his claimed right rests, may be inquired into. *It is, therefore, a challenge to the title to the office, resting upon charges of misconduct in procuring it,* rather than a process to remove, resting upon charges of misconduct in office."

And "*State Ex Rel. Bill vs. Etling,* 29 Kansas, 397."

In that case, the opinion was written by Justice Brewer, afterwards a member of the Supreme Court of the United States. And he says therein:

"The theory of popular government is that the most worthy should hold the offices. Personal fitness—and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions—is the single test which the law will recognize. *That which throws other considerations into the scale,* and to that extent tends to weaken the power of personal fitness, should not be tolerated. ***It*** *tends to turn away the thought of voter from the one question which should be paramount in his mind when he deposits his ballot.* It is in spirit at least, bribery, more insidious, and therefore more dangerous, than the grosser form of directly offering money to the voter."

It is thus clear that the Jurisdiction of This Court has attached, and Petitioner is entitled to a Writ of Certiorari herein, and a hearing on the merits that, upon a final hearing on the merits, his rights under the constitution and laws may be adequately safeguarded.

LOCKE MILLER,
Petitioner.

MATTHEW L. BIGGER,
Counsel for Petitioner.

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APPENDIX

FEDERAL CODE, TITLE 18.
Section 208. Political Contributions; Solicitation.

"It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected, as Senator, Representative, Delegate, or Resident Commissioner, or any officer or employe of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employe, or person."

Section 209. Same; Not to be Received in Public Offices.

"No person shall, in any room or building occupied in the discharge of official duties by any officer or any employe of the United States mentioned in Section 208 of this Title, nor in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other things of value for any political purpose whatever."

Section 210. Same; Immunity from Official Proscription.

"No officer or employe of the United States, mentioned in Section 208, of this Title, shall discharge, or promote, or degrade, or in any manner change the official rank or compensation of any other officer or employe, or promise, or threaten so to do, or for giving or withholding or neglecting to make any contribution of money or valuable things for any political purpose."

Section 211. Same; Making to Officials.

"No officer, clerk, or other person in the service of the United States, shall, directly or indirectly, give or hand over to any other officer, clerk, or a person in the service of the United States, or to any Senator or Member of, or Delegate to Congress, or Resident Commissioner, any money or other valuable things on account of or to be applied to the promotion of any political object whatever."

Section 212. Same; Punishment.

"Whoever violates any provision of Sections 208 to 211 of this title, shall be fined not more than $5,000.00, or imprisoned not more than 3 years or both."

Section 213. Same; Removal from Office.

"Any executive officer or employe of the United States not appointed by the president, with the advice and consent of the senate, who shall request, give to, or receive from, any other officer or employe

of the government, any money or property or other things of value for political purposes shall be at once discharged from the service of the United States."

Section 199. Accepting Bribe by Member of Congress.

"Whoever, being elected or appointed a Member or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, ask, accept, receive or agree to receive, any money, property, or other valuable consideration, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value to him or to any person with his consent, connivance, or concurrence, for his attention to, or services, or with the intent to have his act, vote, or decision influenced on any question, matter, cause or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, or which by law or under the Constitution may be brought before him in his official capacity, or in his place as such Member, Delegate or Resident Commissioner, shall be fined not more than three times the amount asked, accepted, or received, and imprisoned not more than three years; and shall moreover, forfeit his office or place, and thereafter be forever disqualified from holding any office of honor, trust or profit under the Government of the United States."

Section 88. Conspiracy to Commit an Offense Against the United States.

"If two or more persons conspire to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years or both."

SECTIONS OF GENERAL CODE OF OHIO

Section 475-166. Contest of Election.

"The nomination or election of any person to any public office or party position, or the approval or rejection of any issue or question, submitted to the voters, may be contested by qualified electors of the state, county or political subdivision, as the case may be, upon the terms and conditions as hereinafter provided. a. In the case of an office to be filled, or an issue to be determined by the voters of the entire state, or for the offices of members of the Congress of the United States, or for judicial offices higher than that of court of common pleas, or for an office to be filled, or an issue to be determined, by the voters of a district larger than a county, said contest shall be heard and determined by the chief justice, or a justice of the supreme court assigned for that purpose by the chief justice; except that in a contest for the office of chief justice of the supreme court, such contest shall be heard by a justice of such court designated by the governor. b. In the case of all other offices or issues, except judicial offices, such contests shall be heard and determined by a judge of the court of common pleas of the county in which the contest arose. In the case of a contest for a judicial office within a county such contest shall be heard by the court of appeals of the district in which such county is located. If any contestant shall allege prejudice on the part of the judges of the court of appeals or common pleas, assigned by law to hear such appeal, then the chief justice of the supreme court, upon application of any such contestants and for good cause shown, may assign a judge or judges from another court to hear such contest."

(113 v. 307, Sec. 166. Eff. Jan. 1, 1930.)

Section 4785-167. Filing Contest Petition.

"Such a contest shall be commenced by the filing of a petition therefor with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election for or against a candidate for the office or for or against the issue being contested, or by the defeated candidate for said nomination or election, within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority; or if there be a recount, of such nomination or election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, or by the oath of the defeated candidate filing the same, as the case may be, and shall set forth the grounds for such contest. Said petition shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest. The contestor and the person whose right to the nomination or election to such office is being contested, to be known as the contestee, shall be liable to the officers and witnesses for the costs made by them respectively; but if the results of the nomination or election be confirmed or the petition be dismissed, or the prosecution fail, judgment shall be rendered against the contestor for the costs; and if the judgment be against the contestee or if the results of the nomination or election be set aside then the county shall pay the costs as other election expenses are paid." (113 v. 307, Sec. 167, Eff. Jan. 1, 1930.)

Section 4785-168. Fix Time for Trial.

"The court shall fix a suitable time for hearing such contest, not less than fifteen nor more than thirty days after the filing of the petition; and shall cause a copy of the contestor's petition to be served upon the

contestee, or upon the chairman of the committee taking the other side in advocacy of or opposition to any issue, as the case may be, in the same manner as a summons in a civil action. The contestee shall have ten days from the time service has been made upon him in which to answer the relation, and the contestor shall have five days in which to reply to the answer of the contestee. All parties may be represented by counsel and the hearing shall proceed at the time fixed, unless postponed by the judge or judges hearing the case for good cause shown by either party by affidavit; or unless the judge shall adjourn to such time, not more than thirty days thereafter, of which adjournment the parties interested shall take notice."

Section 4785-169. Trial Proceedings.

"The proceedings shall be similar to those in judicial proceedings in so far as practicable, and shall be under the control and direction of the court which shall hear and determine the matter without a jury, with power to order or permit amendment to the petition or proceedings as to form or substance, and to allow adjournments for not more than thirty days, for the benefit of either party, on such terms as to costs and otherwise as shall seem reasonable to the court, the grounds for such adjournments being shown by affidavit. The hearing shall proceed expeditiously and the total of such adjournments shall not exceed thirty days after the date set for the original hearing." (113 v. 307, Sec. 169. Eff. Jan. 1, 1930.)

Section 4785-170. Witnesses and Evidence.

"The said court shall have authority and power to summon and compel the attendance of witnesses, includiing officers of such election, and compel the production of all ballot boxes, lists, books, ballots, tally sheets and other records, papers and documents, which may be required at such hearing. The style and form of summons and subpoenas and the manner of service and the fees of officers and witnesses shall

be the same as are provided by law in other cases, in so far as the nature of the proceedings admits. The court may require any election officer to answer any questions pertinent to the issue relating to the conduct of the making of the returns; and any witness who voted at the election may be required to answer touching his qualification as a voter and for whom he voted." (113 v. 307, Sec. 170. Eff. Jan. 1, 1930.)

Section 4785-171. Judgment of Court.

"Upon completion of the trial the court shall pronounce judgment as to which of such candidates was duly nominated or elected, or whether such issue was duly approved or rejected by the voters; except that in the case of the contest of election of a member of the General Assembly such judgment shall not be pronounced by the court; but a transcript of all testimony taken and all evidence adduced in such contest shall be filed with the clerk of the branch of such legislative body to which the contestee was declared elected, which shall determine the election and qualification of its own members. Any person so declared nominated or elected by the court shall be entitled to his certificate of nomination or election. A certified copy of the order of such court shall constitute such certificate. If the judgment be against the contestee or incumbent and he has already received a certificate of nomination or election, the judgment of the court shall work a cancellation of such certificate. If the court find that no person was duly elected, the judgment shall be that the election be set aside." (113 v. 307, Sec. 171. Eff. Jan. 1, 1930.)

Section 4785-172. Appeal to Supreme Court.

"The person against whom the judgment is ren dered may prosecute error by petition in error, within twenty days, to the supreme court of Ohio; but such error proceedings shall not supersede the execution of the judgment of the court. Such error proceedings

shall take precedence over all other causes upon the calendar, and shall be set down for hearing and determination at the earliest convenient date. The laws and rules of the court governing error proceedings shall apply in the judgment of the lower court be affirmed, the supreme court shall order the judgment of such lower court to be enforced, if the party against whom the judgment is rendered is in possession of the office." (113 v. 307, Sec. 172. Eff. Jan. 1, 1930.)

Section 4785-173. Testimony; Supreme Court

"In contests of election in the supreme court, all testimony shall be in the form of depositions. The contestor shall take and file his testimony within twenty days from the date of filing the petition, unless further time be allowed by the court or judge hearing the contest. The contestee, or the committee defending the issue, shall file his or its testimony within twenty days from the expiration of the contestor's time, unless such court or judge shall allow further time. The court may render such judgments and make such orders as the law and facts shall warrant, including judgment of ouster and induction, and the judgment of the supreme court shall be decisive of the contest." (113 v. 307, Sec. 173. Eff. Jan. 1, 1930.)

RULE XX—RULES OF PRACTICE, SUPREME COURT OF OHIO

REHEARINGS—ISSUANCE OF MANDATES

SECTION 1. "No motion can be made or heard for a rehearing. Application for rehearing of any cause or motion shall be made within fourteen days. after the announcement of the decision. Such application may be either printed or typewritten, and nine copies thereof filed with the Clerk, and shall be confined strictly to reasons for a rehearing. No re-

argument of the cause on such application will be considered."

SECTION 2. "When typewritten applications are filed the same shall meet the requirements of Section 14 of Rule II."

SECTION 3. "Upon filing an application for rehearing of a cause on the General Docket, counsel for the applicant shall give written notice thereof to the Reporter of the Supreme Court."

SECTION 4. "One week after the announcement of the decision of any cause on the General Docket the Clerk shall issue a Mandate as provided by the entry of this Court; and one week after announcement of decision of a motion to certify the record or for leave to file *an appeal*, if such motions be overruled, the Clerk shall issue a certified copy of the entry of this Court to the lower Court; provided, that if the Clerk be notified, within one week after announcement of a decision on the motion or general docket that application for a rehearing will be filed, such Mandate or certified copy of entry shall be held until such application be disposed of by the Court or the time for filing the same has expired and shall be then forthwith issued. If an application be granted the former entry of this Court shall be thereby vacated and no Mandate or certified copy of entry shall issue until such rehearing has been had and the case or motion has again been decided."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 545

LOCKE MILLER,

Petitioner,

vs.

MICHAEL J. KIRWAN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT.

H. H. Hoppe,
Counsel for Respondent.

INDEX.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement of fact	2
Argument	5
Appendix	8

Cases Cited.

Honeyman v. *Hanan* (1937), 300 U. S. 14	2, 7
Patterson v. *Stanolind Oil & Gas Co.*, 305 U. S. 376	2, 7
Smith v. *Polk* (1939), 135 O. S. 70	3

Constitutional Provisions.

Article I, Section 5	3

Federal Statutes.

28 U. S. C. A. 344	2, 8

State Statutes.

Ohio General Code—	
Section 4785-166	9
Section 4785-167	9
Section 4785-173	10

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BRIEF OF RESPONDENT.

Opinion Below.

The court below rendered no opinion. The entry of the court under date of September 20, 1940, is set forth in the record, pages 292 and 293.

Jurisdiction

The judgment of the Supreme Court of Ohio was rendered on September 20, 1940. (R. 292 and 293) An application for rehearing filed October 3, 1940 (R. 289-d) was denied

October 9, 1940. (R. 292 and 293) The petition for writ of certiorari was filed November 2, 1940.

Jurisdiction of this Court is claimed by petitioner under favor of Section 237(b) of the Act of February 13, 1925, 43 Stat. 937, 28 U. S. C. A. 344 (*infra* p. 8).

Respondent denies the jurisdiction of this Court because:

(a) No Federal question was necessary to the determination of this cause in the Supreme Court of Ohio; *Honeyman* v. *Hanan,* (1937), 300 U. S. 14.

(b) No substantial Federal question was presented to the Supreme Court of Ohio and none is here presented. *Patterson* v. *Stanolind Oil & Gas Co.,* 305 U. S. 376.

Question Presented.

Did the court below, in denying petitioner the right to take and file additional depositions, deny him that due process of law and equal protection of the law guaranteed him by the Fourteenth Amendment?

Statutes Involved.

The Pertinent statutes will be found in the Appendix, *infra,* pp. 9 to 10.

Statement of Fact.

This was an original action filed in the Supreme Court of Ohio on June 7, 1940, under favor of Section 4785-166 of the General Code of Ohio (*infra,* p. 9). Petitioner sought to contest the Democratic nomination of respondent *at the May 14, 1940, primary election* for the office of United States Congressman for the 19th District of Ohio, on the ground that respondent had acquired such nomination by resort to corrupt practices. The petition filed below made specific charges of alleged corrupt practices claimed to have been resorted to during the course of respondent's success-

ful campaign for re-election at the *general election held in November, 1938*, but made no direct charges of corrupt practices resorted to during the course of the campaign *for renomination at the May 14, 1940, primary.* (See Petition, R. 1-9) No court has jurisdiction to hear and determine a contest *of the general election held in November, 1938,* for the reason that under the Constitution each house of Congress is the sole judge of the election and qualification of its own members. (See Article I, Section 5, *infra,* p. 8. *Smith* v. *Polk,* (1939) 135 O. S. 70.)

On June 27 and July 1, 1940, (R. 290), petitioner filed below in deposition form his evidence in support of the charges made in his petition. (See G. C. 4785-173, *infra,* p. 10.) On July 15, 1940, respondent filed his exceptions thereto and motion to strike (R. 291) upon the grounds that the testimony offered (1) dealt with the 1938 general election, (2) did not show any corrupt practice resorted to in the course of the May, 1940, primary, and (3) was purely hearsay.

On July 31, 1940 (R. 291) petitioner filed his brief on the merits below and on August 14, 1940, respondent filed his brief. (R. 291)

Thereafter on August 19, 1940, petitioner filed below his motion for leave to take and file additional depositions, (G. C. 4785-173, *infra,* p. 10), claiming to have discovered new witnesses who could testify as to material facts not known to petitioner when depositions were originally taken. (R. 268 and 291) The character of the new evidence claimed to have been discovered was not set forth in the motion. On August 26, 1940, petitioner's motion was denied and the cause set for hearing on its merits on August 30, 1940. (R. 292)

On August 28, 1940, petitioner filed below his motion for rehearing of his application for leave to take and file additional depositions, supported by affidavit, (R. 271 and

273), and this application for rehearing was heard on August 30th, followed by a hearing on the merits of the case. At the conclusion of both such hearings petitioner was, at his request, granted five days within which to file an affidavit, setting forth the character of the additional testimony he desired to offer, (Stipulation re printing of the record, p. 3, R. 297 and 297-a), and his affidavit in this respect was filed on September 4, 1940. (R. 278 to 287)

On September 9, 1940, respondent filed below a memorandum resisting petitioner's appplication for rehearing on his motion to take and file additional depositions, supported by the affidavits of the witnesses named in petitioner's affidavit of September 4th, to the effect that they could not testify as petitioner claimed they would in petitioner's affidavit of September 4th. (R. 287-a to 287-w)

On September 9, 1940, petitioner filed below another affidavit with respect to a matter entirely foreign to the issue at hand. (R. 288 and 292-293. See court entry of September 20, 1940.)

On September 12th respondent filed below a letter from one of the witnesses mentioned in petitioner's affidavit of September 4th. (R. 289-c)

On September 11th petitioner filed below a memorandum replying to the memorandum and affidavits filed by respondent on September 9th. (R. 289-a)

All of the foregoing applications, affidavits and memoranda were taken under advisement by the court. On September 20, 1940, the court below

(a) denied petitioner's application for rehearing of motion for leave to take and file additional depositions, (R. 292);

(b) dismissed petitioner's affidavit (R. 292 and 293) filed September 9th as having no bearing on the issues presented, (R. 292 and 293);

(c) denied the prayer of and dismissed petitioner's petition filed below on the ground that no evidence had been adduced showing that respondent had resorted to any corcupt practice in obtaining the Democratic nomination at the May 14, 1940, primary, (R. 293); and, in view of the foregoing

(d) found it unnecessary to pass upon respondent's exceptions to and motion to strike petitioner's depositions which had been filed. (R. 293)

Argument.

Petitioner's right to file the action below is one granted by statute. (G. C. 4785-166-167, *infra*, p. 9-10.) The same statute likewise required petitioner to file his evidence in deposition form within twenty days after filing suit unless "further time be allowed by the court." (G. C. 4785-173, *infra*, p. 10.) Suit was filed June 7, 1940. (R. 290) It is thus obvious that leave of court had to be obtained to take and file depositions after June 27, 1940. It is equally clear that the court would grant such leave only upon a showing that the additional evidence sought to be offered was material and could not have been adduced within the time fixed by statute.

When petitioner on August 19th first asked for leave, he made no showing whatsoever that the evidence sought to be produced was material or that it could not have been produced by June 27th. (R. 268) On his application for rehearing filed August 28th (R. 271) and orally heard by the court on August 30th, (See stipulation re printing of record, p. 3, R. 297 and 297-a) petitioner again failed to show that the alleged newly discovered evidence would support any charge of corrupt practice resorted to in the course of the May 1940 primary campaign. His alleged newly discovered evidence was pure hearsay and dealt en-

tirely with alleged corrupt practices resorted to in the course of the campaign for reelection at the November 1938 general election. Nevertheless, on August 30th the court below granted petitioner (See Stipulation re printing of record p. 3, R. 297 and 297-a) the right to file an additional affidavit with respect to the testimony he desired to offer and this affidavit was filed September 4, 1940. (R. 278 to 287)

In this affidavit of September 4, 1940, petitioner set forth the names of the witnesses whose testimony he desired to offer by additional depositions. He likewise set forth what he hoped to prove by each witness. Respondent thereupon obtained the affidavit and statement of each of the witnesses mentioned in petitioner's affidavit, which affidavits and statements are all to the effect that not one of them could testify to the effect set forth in petitioner's affidavit, and further that not one of them participated in any manner in the campaign preceding the May 1940 primary. These affidavits, affixed to a memorandum of respondent, were filed in the Supreme Court of Ohio on September 9, 1940. (R. 287-a, 287-1, 287-n, 287-q, 287-t.) On September 11, 1940, (R. 289-a) petitioner's only answer to these affidavits was that under the statute, Section 4785-173, *infra* p. 10), the cause was to be heard upon depositions and not upon affidavits, an answer which begged the question. The affidavits were not filed as evidence upon the merits of the case but as answer to his own affidavit filed in support of his application for a rehearing on his motion to take and file additional depositions and to show that petitioner was indulging in a lot of wishful thinking and could not offer by way of additional deposition the evidence which he claimed he could offer.

Thus the record of the proceedings had in the Supreme Court of Ohio shows that petitioner was granted ample

opportunity to be heard, was heard and was not denied due process of law or the equal protection of the laws.

It is thus also apparent from the record below that no Federal question was necessary for a determination of the cause and that no substantial Federal question was presented to the court below. *Honeyman* v. *Hanan,* (1937) 300 U. S. 14; *Patterson* v. *Stanolind Oil & Gas Co.,* 305 U. S. 376.

We therefore respectfully submit that this Court has no jurisdiction to review the judgment of the court below upon writ of certiorari. Further, if such jurisdiction does exist, the record of the proceedings below shows that no error was committed and that petitioner was granted ample opportunity to be heard and was heard and was not denied either the due process of law or the equal protection of the laws guaranteed him by the Fourteenth Amendment to the Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX.

Federal Constitution

Article I, Section 5: "Each house shall be the judge of the elections, returns, and qualifications of its own members. * * *"

Federal Statutes

28 U. S. C. A. 344: "(Judicial Code, section 237, amended.) *Appellate jurisdiction of decrees of State courts; certiorari.* (a) * * *

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

"(c) * * *"

State Statutes

"§ 4785-166. *Contest of election.* The nomination or election of any person to any public office or party position, or the approval or rejection of any issue or question, submitted to the voters, may be contested by qualified electors of the state, county or political subdivision, as the case may be, upon the terms and conditions as hereinafter provided. a. In the case of an office to be filled, or an issue to be determined, by the voters of the entire state, or for the offices of members of the congress of the United States, or for judicial offices higher than that of court of common pleas, or for an office to be filled, or an issue to be determined, by the voters of a district larger than a county, said contest shall be heard and determined by the chief justice, or a justice of the supreme court assigned for that purpose by the chief justice; except that in a contest for the office of chief justice of the supreme court, such contest shall be heard by a justice of such court designated by the governor. b. In the case of all other offices or issues, except judicial offices, such contests shall be heard and determined by a judge of the court of common pleas of the county in which the contest arose. In the case of a contest for a judicial office within a county such contest shall be heard by the court of appeals of the district in which such county is located. If any contestant shall allege prejudice on the part of the judges of the court of appeals or common pleas, assigned by law to hear such appeal, then the chief justice of the supreme court, upon application of any such contestants and for good cause shown, may assign a judge or judges from another court to hear such contest."

"§ 4785-167. *Filing contest petition.* Such a contest shall be commenced by the filing of a petition therefor with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election for or against a candidate for the office or for or against the issue being contested, or by the defeated candidate

for said nomination or election, within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority; or if there be a recount within ten days after the results of the recount of such nomination or election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, or by the oath of the defeated candidate filing the same, as the case may be, and shall set forth the grounds for such contest. Said petition shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest. The contestor and the person whose right to the nomination or election to such office is being contested, to be known as the contestee, shall be liable to the officers and witnesses for the costs made by them respectively; but if the results of the nomination or election be confirmed or the petition be dismissed, or the prosecution fail, judgment shall be rendered against the contestor for the costs; and if the judgment be against the contestee or if the results of the nomination or election be set aside then the county shall pay the costs as other election expenses are paid."

"§ 4785-173. *Testimony; supreme court.* In contests of election in the supreme court, all testimony shall be in the form of depositions. The contestor shall take and file his testimony within twenty days from the date of filing the petition, unless further time be allowed by the court or judge hearing the contest. The contestee, or the committee defending the issue, shall file his or its testimony within twenty days from the expiration of the contestor's time, unless such court or judge shall allow further time. The court may render such judgments and make such orders as the law and facts shall warrant, including judgment of ouster and induction, and the judgment of the supreme court shall be decisive of the contest."